United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

460

OCTOBER TERM, 1906.

No. 1726.

No. 18, SPECIAL CALENDAR.

STEPHEN H. NASH, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 20, 1906.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1906.

In the Court of Appeals of the District of Columbia.

No. 1726.

STEPHEN H. NASH, Plaintiff in Error,
vs.
DISTRICT OF COLUMBIA.

a No. 292,032.

In the Police Court of the District of Columbia, August Term, 1906.

DISTRICT OF COLUMBIA
vs.
STEPHEN H. NASH.

Information for Violation of Garbage Regulations.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 (*Information.*)

In the Police Court of the District of Columbia, August Term, A. D. 1906.

THE DISTRICT OF COLUMBIA, *ss:*

Edward H. Thomas, Esq., Corporation Counsel, by James L. Pugh, Jr., Esq., Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that Stephen H. Nash, late of the District of Columbia aforesaid, on the 16th day of August, in the year A. D. nineteen hundred and six, in the District of Columbia aforesaid, and in the City of Washington, did then and there carry and convey certain garbage in a vehicle through the streets of said City, said Nash not being the City Contractor; contrary to and in violation of the Garbage Regulations of the District of Columbia.

EDWARD H. THOMAS,
Corporation Counsel,
By J. L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared C. C. Grimsley this 17th day of August, A. D. 1906, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

[Seal Police Court of District of Columbia.]

[SEAL.] L. F. ENGLESBY,
Deputy Clerk Police Court of the District of Columbia.

2 In the Police Court of the District of Columbia.

Information No. 292,032.

DISTRICT OF COLUMBIA
vs.
STEPHEN NASH.

Motion for New Trial.

Now comes the defendant in the above entitled cause, by his Attorney George P. Hoover, and moves the Court to set aside its findings and grant a new trial on the following ground, to wit:

1. That the finding of fact is contrary to the evidence.
2. That the finding of fact is contrary to the weight of the evidence.
3. That the finding of the Court is contrary to law.
4. That the defendant was taken by surprise by the evidence adduced at the trial of this cause.
5. On the ground of newly discovered evidence, as is material to the trial of said cause.

GEORGE P. HOOVER,
Attorney for Defendant.

3 In the Police Court of the District of Columbia.

Information No. 292,032.

DISTRICT OF COLUMBIA
vs.
STEPHEN NASH.

Bill of Exceptions.

Be it remembered that at the trial of this cause, which came on for hearing on the 29th day of August, 1906, the District of Columbia, to prove the issues on its part joined, offered the following testimony:—

C. C. GRIMSLEY, a witness on behalf of the District of Columbia, first being duly sworn, testified as follows:

That he is a member of the Metropolitan Police force; that on the 16th day of August, 1906, he arrested the defendant on the charge

of hauling garbage; that he found in the wagon driven by defendant cans and barrels; that two of the cans contained grease and rotten meat; that it was offensive; that defendant was not in the employ of the city contractor.

On cross examination the witness testified that he arrested the defendant on Pennsylvania Avenue between Fourteenth and Fifteenth Streets; that he came out of the alley adjoining the New Willard Hotel; that he did not look into the cans until the defendant came to the station house on Twelfth Street; that the cans were made of galvanized iron; that when he looked into the cans he found grease with bits of meat in it; that it was a very hot day; that witness has handled meats; that he supposes meat will smell when exposed to the air for a few hours; that the can had an air
4 tight top on it; that he did not smell any odor until the top of the can was removed; that the contents of the can was an oily substance with meat in it; that it looked as if it had been rendered down to some extent but not altogether; it was not all boiled up because there was some pieces of meat in it; all mixed together.

On re-direct examination the witness testified that it looked a*d* if it had been rendered from the grease that was mixed with it; because it was cold, and it looked as if it had been in a kettle and partly rendered.

R. E. LEE, a witness on behalf of the District of Columbia, first being duly sworn testified in substance as follows:

That he is a Sergeant of the Metropolitan Police force; that when Mr. Grimsley brought the defendant to the station he asked witness to look at the cans in the wagon; that witness saw two cans nearly full, and they had grease and fat and some pieces of meat in it; that there was an odor to it when the lid was taken off; that it smelled a little offensive like; it had been exposed; probably had not been on ice.

On cross examination the witness testified that before he became a member of the Police force he was engaged in the butcher business; that from his experience gained in the butcher business he knows that in the handling of meats in hot weather the meat which he saw in the cans would have an odor if exposed for a matter of a few hours; that what he saw in the cans was particles of meat mixed in with the grease and it looked as if the grease had been rendered from the frying of fat and that the other parts of meat had not been wholly rendered; that it was a galvanized iron can with an
5 air tight top;

The District of Columbia thereupon announced its case closed, and counsel for the defendant thereupon moved the court to discharge the defendant on the ground that the District had failed to make out a case of violation of the Police Regulations, but the court overruled the motion, and counsel for the Defendant thereupon duly noted an exception to the ruling of the court, which exception was thereupon noted upon the minutes of the court, and notice thereof given by counsel for the defendant of an intention to apply to the Court of Appeals for a writ of error.

The defense thereupon introduced the following evidence:—

STEPHEN H. NASH, first being duly sworn was examined as a witnes in his own behalf and testified in substance as follows:—

That he is the party named as defendant in the above entitled cause; that on the sixteenth day of August, 1906, he was engaged in hauling grease; that he was employed as a driver by the Norton Manufacturing Company, whose place of business is located at Four Mile Run, Alexandria County, Virginia; that said company is engaged in the manufacture and refining of greases and tallow; that on the sixteenth day of August, 1906 he got the grease from the New Willard Hotel, and after driving out of the Alley adjoining the Hotel he was arrested by Officer Grimsley; that the cans contained Lamb, pork and all are put on a range and fried and then they pour it into my cans as liquid grease; that witness put on the top of the cans burlap and then put the top on very tight; that it is air tight; that he has frequently seen the grease in course of preparation at the hotel; that it is put into a pan and reduced to grease; that in doing this there is a part of the fat known as crackling which is not altogether reduced to grease; that there was no offensive odor
6 from the contents of the cans; that he had been to the Hotel the day before and collected the grease; that the grease which he had on the wagon at the time of the arrest was only the accumulation of grease within twenty-four hours; that he got from the New Willard Hotel one hundred and seventy-five pounds of grease on the day of his arrest for which he paid on behalf of his employer two cents a pound;

On cross examination the witness testified that he makes collections four times a week, and in warm weather five times; that he had been to the Willard and collected the grease the day before his arrest; that the can for the reception of the grease is located near the range in the kitchen; that witness takes the cans and puts them into his wagon just as he finds them and leaves other cans in their place; that he has frequently seen the cook pour the grease into the cans; that it is liquid from the fryings of meat, pork, chicken, lamb and all stuff like that; just liquid grease poured off after it is fried, and the balance of the stuff is thrown into the garbage can; the garbage can sits in a different place from my can altogether; that it was not general food refuse.

HOWARD R. NORTON, being first duly sworn was examined as a witness on behalf of the defendant, and testified substantially as follows:—

That he is the Secretary and General Manager of the Norton Manufacturing Company; that said company is engaged in the refining of grease and manufacturing fertilizer and has its plant located at Four Mile Run in Alexandria County, Virginia, and also a warehouse at First and W Streets Southwest in the City of Washington, District of Columbia; that defendant is employed by said
7 company as a driver; that he goes around to the different hotels and buys this material; that the material consists of grease from animal fats; that his company pays from one and one-

half to three cents a pound therefor; that it is removed to the company's plant at Four Mile Run; that the company has been engaged in this business in the District of Columbia since 1859; that in the performance of his duties as General Manager of the company he sees the material which is purchased from the hotels and restaurants; that it consists of grease from the rendering of fats from meats; that it is put into a can and collected by the defendant; that his company expends about twenty-thousand a year in the purchase of this material which is used in the manufacture of tallow and refined greases.

On cross examination the witness testified that his company refines grease after buying it from the different hotels; that he has seen it prepared in the hotels; that when the lards and fats are fried and reduced to grease it is poured into a can; that it is simply refuse lard and raw fats that have been melted in the pan; that it does not consist of the entire refuse matter from the hotel; that witness or his driver do not buy any decomposed meats; that it is simply melted fat; that he does not get raw fats from hotels; that he buys that from the meat shops; that the hotels melt it in a pan; that they do not refine it down as fine as a manufacturer does; that there is no solid refuse matter, but simply grease and the crackling; that the material does not smell noxious.

LOUIS PFAFF, being first duly sworn was examined as a witness on behalf of the defendant, and testified as follows:

8 That he has been employed as chef at the New Willard hotel for the past three years, and was so employed on the sixteenth day of August, 1906; that as chef he has charge of the kitchen and the preparation of all food stuffs used in the hotel; that on the sixteenth day of August, 1906 the defendant called at the hotel and purchased a can of grease; that the grease is sold to defendant at two cents a pound; that witness had charge of putting the grease in the cans; that the cans contained the grease that we get from meats and mutton; it is all taken from the meat and put into a big grease kettle and rendered down; we use all our greases for frying purposes; after the grease gets dark so that it cannot be used any more it goes into the grease can and is collected by the defendant; it is all rendered down; sometimes in the rendering of the fats there remain particles of cracklings and it all goes into the pot; that no rotten, decomposed or stale meats are put into the cans which defendant receives; that all meat of this kind is put into a separate can used for the reception of garbage; that defendant does not get any stale or decomposed meats, but only the grease; that on the sixteenth day of August the cans which defendant got contained only grease and cracklings.

On cross examination the witness testified that it is all put through a process of frying before defendant gets it; that there was no offensive odor from the material which the defendant got on that day; that defendant had been to the hotel and received grease the day before; that there is no odor from the grease that defendant gets; the grease is clean and there is nothing that contains a smell; it has all

gone through a process of cooking; that if it smelled bad witness could not keep it in the kitchen of the hotel; that it would have to remain at least three or four days before there could be any
9 bad odor. When the grease gets dark; when I could not use it for frying any more, then he gets it.

The defendant by his counsel thereupon announced his case closed:

Counsel for the defendant thereupon moved the court upon the whole evidence to discharge the defendant on the ground that as matter of law he was entitled to be acquitted as no violation of the Police Regulations had been shown, which motion the court overruled, and to the ruling of the court in over-ruling the motion counsel for the defendant thereupon duly noted an exception, which exception was noted upon the minutes of the court, and counsel for the defendant gave notice of intention to apply to the Court of Appeals for a writ of error.

Thereupon counsel for the defendant prayed the Court to grant the following instructions:

1. The defendant prays the court to rule that upon the whole evidence as a matter of law he has not been shown to be guilty of the offence charged in the information, and therefore he is entitled to be discharged.

2. The defendant prays the court to rule that upon the facts of this case the regulations promulgated by the Commissioners of the District of Columbia in respect to the removal and disposition of garbage have no application, and that section one of article XIV of the Police Regulations in which the Commissioners attempt to define the term "garbage" is arbitrary and unreasonable and is therefore illegal and void.

3. The defendant prays the court to rule that upon the facts of this case the regulations promulgated by the Commissioners of the District of Columbia in respect to removal and disposition of garbage, under which the information in this cause is filed, is unconstitutional and void as being arbitrary and unreasonable.

10 4. The defendant prays the court to rule that the regulations promulgated by the Commissioners of the District of Columbia in respect to the subject of garbage, as applied to the facts of this case, are unconstitutional and void as the effect of said regulations is to take private property without just compensation and without due process of law.

5. The defendant prays the court to rule as a matter of law that upon the whole evidence of this case the material which is shown to have been hauled by the defendant on the day charged in the information is not garbage within the ordinary meaning of that term, or within the scope of the regulations promulgated by the Commissioners, but that the same is an article of commerce which the owner thereof might dispose of without undue restriction, provided it is not shown to be a nuisance and a menace to the public health, and the defendant is entitled to be acquitted.

6. The defendant prays the court to rule as a matter of law that

the material which is shown by the whole evidence to have been hauled by the defendant on the day charged in the information is not garbage, and was not *noisome* or a menace to the public health, and therefore not a nuisance and the defendant is entitled to be discharged.

The court thereupon refused to grant each and every one of the foregoing instructions, to which action of the court the defendant by his counsel then and there noted a specific exception to the ruling of the court in so refusing to grant each of the said instructions, which exceptions were duly noted upon the minutes of the court at the time same were taken, and notice given of an intention to apply for a writ of error to the Court of Appeals before the decision of the Court was announced.

11 The Court thereupon announced that he would find the defendant guilty of the charge contained in the information and imposed a fine of five dollars, to which judgment of the Court the counsel for the defendant duly excepted and gave notice of his intention of applying for a writ of error to the Court of Appeals.

In witness whereof, at the request of the defendant's counsel, the presiding justice signs this bill of exceptions this 31st day of August 1906.

LEWIS I. O'NEAL,
Justice Pro Tem., Presiding.

12 (*Copy of Docket Entries.*)

No. 292032.

In the Police Court of the District of Columbia, August Term, A. D. 1906.

DISTRICT OF COLUMBIA
vs.
STEPHEN H. NASH.

Information for Violation of Garbage Regulations.

Defendant arraigned August 24, 1906. Plea: Not guilty. Judgment: Guilty. Sentence: To pay a fine of five dollars and, in default, to be committed to the Workhouse for the term of fifteen days. $5.00 Pd.

Notice given by defendant of the filing of a motion for a new trial.

Aug. 25, 1906.—Motion for a new trial filed, argued and granted.

Aug. 29, 1906.—Judgment re-affirmed.

Exceptions taken to the rulings of the Court on matters of law and notice given by the defendant in open Court of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

Ten dollars collateral security deposited in lieu of bonds. Thereupon proceedings stayed for ten days.

Aug. 31, 1906.—Bill of exceptions filed, settled and signed.

Sept. 7, 1906.—Writ of error received from the Court of Appeals of the District of Columbia.

13 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, Joseph Y. Potts, Clerk of the Police Court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 12 inclusive, to be true copies of originals in cause No. 292,032 wherein the District of Columbia is plaintiff and Stephen H. Nash defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, — the City of Washington, in said District, this 20th day of September, A. D. 1906.

[Seal Police Court of District of Columbia.]

JOSEPH Y. POTTS,
Clerk Police Court, Dist. of Columbia.

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Lewis I. O'Neal, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, plaintiff and Stephen H. Nash, defendant a manifest error hath happened, to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that errer, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 7th day of September, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by
SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

[Endorsed:] Filed Sep. 7, 1906. Joseph Y. Potts, clerk police court, D. C.

Endorsed on cover: District of Columbia police court. No. 1726. Stephen H. Nash, plaintiff in error, *vs.* District of Columbia. Court of Appeals, District of Columbia. Filed Sep. 20, 1906. Henry W. Hodges, clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1906.

No. 1726.

No. 18 SPECIAL CALENDAR.

STEPHEN H. NASH, PLAINTIFF IN ERROR

v.

DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFF IN ERROR

GEO. P. HOOVER,
Attorney for Plaintiff in Error.

Giles Printing Company, 317 Sixth Street N. W.

IN THE

Court of Appeals of the District of Columbia

October Term, 1906.

STEPHEN H. NASH, Plaintiff in Error, vs. DISTRICT OF COLUMBIA.	No. 1726. No. 18 Special Calendar.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes up for hearing on a writ of error to the Police Court of the District of Columbia, in which the plaintiff in error appeals from a judgment of conviction based upon an information filed in said court, charging that the plaintiff in error "on the sixteenth day of August, 1906, in the District of Columbia, and in the City of Washington, did then and there carry and convey certain garbage in a vehicle through the streets of said city, said Nash not being the city contractor, contrary to and in violation of the garbage regulations of the District of Columbia."

The information is based upon sections one and nine of Article fourteen of the Police Regulations of the District of Columbia, which read as follows :

ARTICLE XIV.

Garbage, Ashes and Other Refuse.

Section 1. The word "garbage," wherever it occurs in these regulations, shall be held to mean the refuse of animal and vegetable foodstuffs, and the words "dead animal" wherever they occur in these regulations shall be held to mean any dead animal not killed for food.

Section 9. It is hereby made the duty of the contractor with the District of Columbia for the collection and removal of garbage and dead animals to collect and remove, in accordance witb the regulations and contract of the said District, all garbage, dead animals, fish and refuse animal and vegetable matter found within the District, to some place to be designated or approved by the Commissioners of the District, and to dispose of the same through a reduction or consumption process, subject to the sanitary inspection and approval of said Commissioners; and each cart or other vehicle used for the purpose of removing garbage shall have the word "garbage" and the number of the wagon in large white letters on a black ground, plainly painted or attached to each side of the wagon bed, which shall be of metal, water-tight, and provided with tight-fitting covers, and be approved by the Superintendent of Street Cleaning. All dead animals shall be removed to the place of disposal in covered wagons or other vehicles or conveyances as nearly air-tight as possible, to be approved by the Superintendent of Street Cleaning. And it shall be unlawful for any person to use for the removal of garbage or dead animals any cart, wagon, vehicle or other conveyance not so approved. No other person or party except the District contractor, his, their or its agents, shall carry, convey or transport through the streets, alleys, or public places of the said District, any garbage, dead animals, fish or refuse animal or vegetable matter; and it shall be unlawful for any person to in-

terfere in any manner with the collection and disposal of such materials or dead animals by the District contractor, his, their, or its agents or employees."

The defendant in error introduced two police officers as witnesses, who testified in substance that after the arrest of the plaintiff in error they examined the cans in the wagon and found two cans containing grease and particles of meat; that it looked as if it had been rendered down to some extent, but not altogether; that the contents of the can were offensive, or that it smelled offensive like it; had been exposed; that, from their experience in handling meats, it would have that odor if exposed for a few hours; that there was no odor while the tops were on the cans. (Rec. pp. 2 and 3).

The plaintiff in error proved that he was employed as a driver for the Norton Manufacturing Company; that the cans were made of galvanized iron, covered with burlap and fitted with air tight tops; that the material contained in the cans was grease, and the rackling or portions which were not entirely reduced in the process of frying; that the material was collected from the New Willard hotel, and the grease was from the frying of fats trimmed from meats used in the preparation of food stuffs; that the cans did not contain any rotten, decomposed or stale meats, and that there was nothing about it to create an offensive odor or smell; that it was the accumulation of grease for twenty-four hours; that the cans contained one hundred and seventy-five pounds of grease, which the employer of the plaintiff in error had bought for two cents per pound; that the said employer is engaged in the manufacture and refining of greases and has its plant for this purpose at Four Mile Run, Virginia; that it has been engaged in this business in the District of Columbia since 1859, and expends

annually the sum of twenty thousand dollars in the purchase of this material from hotels and restaurants.

ASSIGNMENTS OF ERROR.

I. The court erred in refusing to grant the motion of the plaintiff in error to discharge him on the ground that as a matter of law he was entitled to an acquittal as no case of violation of the Police Regulations had been shown by the evidence.

II. The court erred in refusing to grant prayer numbered one of the plaintiff in error.

III. The court erred in refusing to grant prayer numbered two of the plaintifl in error.

IV. The court erred in refusing to grant prayer numdered three of the plaintiff in error.

V. The court erred in refusing to grant prayer numbered four of the plaintiff in error.

VI. The court erred in refusing to grant prayer numbered five of the plaintiff in error.

VII. The court erred in refusing to grant prayer numbered six of the plaintiff in error.

ARGUMENT.

I.

In the argument of this case the plaintiff in error will discuss the first, second and seventh assignments of error together.

The information in this case charged the defendant below with removing garbage, without being the District contractor.

It will be conceded as an elementary principle of law, too well determined to admit of doubt, that upon the charge

being made, it was incumbent upon the prosecution to establish that the substance which the defendant below was hauling at the time of his arrest was in fact "garbage," and, unless it succeeded in doing this, the charge must necessarily fail, and the defendant below entitled to an acquittal.

The evidense offered by the prosecution in support of the charge simply showed that the defendant below at the time of his arrest was engaged in hauling grease which had been entirely rendered down, and some particles of meat mixed in with it which had been put through a process of reduction but had not been wholly reduced to grease; that the cans were made of galvanized iron and were air tight, and that when the wagon was proceeding through the streets of the city with the tops of the can in place there was no odor from them, and consequently they could not in any manner be objectionable. The only evidence in support of the prosecution's case which could in any manner tend to sustain the charge was to the effect that, when the tops of the cans were removed there was perceptible an offensive odor, according to the testimony of one of the witnesses, and were "a little offensive like," in the language of the other. This being all the testimony offered by the prosecution, it is respectfully submitted that the motion made by the defendant below to be discharged upon the conclusion of the case of the District of Columbia should have prevailed, as it had not been shown that the material contained in the cans was garbage within the ordinary acceptation of that term, or within the decisions of this court or of any of the authorities bearing upon this subject.

The evidence offered by the defendant below showed the character of the cans and the manner in which they were covered, and this taken with the evidence of the prosecution

showed conclusively that while the cans were being conveyed through the streets they could not, and in fact did not, give off any offensive odor, and therefore could not be said to be a nuisance or a menace to the public health; and further, that they were being hauled to a point quite beyond the District of Columbia, namely, to Four Mile Run, in Virginia.

One of the witnesses for the prosecution (C. C. Grimsley) testified that the cans contained grease and rotten meat mixed in with it ; and that it was offensive ; that he supposes meat would smell when exposed for a few hours ; that the contents of the can had the appearance of having been put through a process of reduction by frying, but that it had not all been rendered down, which testimony showed that the owner of the meat and the fat trimmings had not abandoned it as worthless, but on the contrary had put it through a course of preparation which would prevent its becoming a nuisance and make it a marketable commodity.

The testimony of the only other witness for the prosecution (R. E. Lee) was to the effect that the cans contained "grease. fat and some pieces of meat in it ; that there was an odor to it when the lid was taken off ; that it smelled a little offensive like, it had been exposed, probably had not been on ice," and on cross-examination he testified that he had formerly been engaged in the butcher business, and he knows that in the handling of meats in hot weather the meat which he saw in the cans would have an odor if exposed for a few hours ; that the grease looked as if it had been rendered from the trying of fat, and some part of it had not been wholly rendered down.

This being all the testimony offered to sustain the case of the prosecution, it is respectfully submitted that the motion to dismiss should have been granted by the court, as the

evidence utterly failed to show that the defendant below had been guilty of any offense. The evidence did not show that the material contained in the cans was garbage within the ordinary and accepted meaning of that term, but on the contrary showed that it consisted of grease which had been wholly rendered from the frying of fats and some particles of meat which had only been partially rendered. In respect to the character of the grease, both witnesses said that there was absolutely no odor from the cans while the tops were on, and therefore it could not have been noisome or a nuisance injurious to the public health. There was no evidence to show that the contents of the cans had been kept on the premises, or that the contents had been exposed for an unreasonable length of time, but that the odor which was observed by the officers when the tops of the cans were removed could have been created if allowed to stand for a matter of a few hours during hot weather such as existed upon the day of the arrest.

After the court overruled the motion to dismiss at the close of the case of the prosecution the defendant below, it is respectfully submitted, proved conclusively that the contents of the cans was not garbage, but that it consisted entirely of matter which was not unwholesome or in any manner offensive or a menace to the public health, and therefore could not be said to be noisome or a nuisance.

The plaintiff in error established by the testimony of three witnesses that the contents of the cans consisted of grease and the crackling from the fat which is not wholly reduced to grease in the process of rendering; that there was no offensive odor to it; that it was not such as could be termed a nuisance. Upon the testimony it is clear that it could not be a menace to the public health.

The man who was best qualified to testify upon this sub-

ject was the witness Pfaff, chef at the New Willard Hotel, who testified that he put the material into the cans, and that before it was put into the cans he put it through a process of reduction ; that the cans for the reception of this material were separate and distinct from those for the reception of refuse or garbage ; that no rotten, decomposed or stale meat was put into the grease cans, nor was there any odor from it ; that the defendant below had collected the material at the hotel on the day preceding his arrest, and upon the day of his arrest had in the cans the grease collected that day, which was the accumulation of twenty-four hours ; that the grease was clean and there was nothing to create a smell ; that if it had smelled bad he could not have kept it in the kitchen of the hotel ; that it would have to remain there at least three or four days before there would be any odor.

This case being tried by the court, without the intervention of a jury, and the court, therefore, being the arbiter of the questions of law as well as those of fact, it is respectfully submitted that upon the whole evidence of this case it is clearly shown that the material which the defendant below was hauling at the time of his arrest was not garbage, but that it was a commodity which was not noisome or in any manner a nuisance or injurious to the public health, and that therefore the owner of the property had a perfect right to dispose of it the same as he would any other article of property, and that the right of the defendant below as the agent and employe of the purchaser was equal and co-extensive with that of the vendor, and he should be allowed to remove and convey the cans through the streets of the District of Columbia without being interfered with.

Having shown that the material which was being con-

veyed by the plaintiff in error at the time of his arrest was not noisome, or a nuisance, or injurious to the public health, but that it was an article of commerce, interference with which by the Police Department was wholly unnecessary and unwarranted. Counsel will proceed to a discussion of the authorities bearing upon this question.

In the case of Campbell vs. District of Columbia (19 App. D. C. 131) in which the defendant was convicted in the Police Court of a violation of the regulation involved in this case in conveying a dead animal through the streets, Mr. Justice Shepard, speaking for the court, said :

> "After much consideration, and with due regard to the public interests involved, our conclusion is that the owner's right of property did not cease with the death of the animal, which did not at once become a nuisance, and that he had the right to dispose of the carcass and procure its removal from the city and district limits before it could become offensive or dangerous to the public health, and in a manner specified by the requirements for transportation along the streets and other public places of the city and district.
>
> "Dominion over property includes the right to dispose of it freely, and the denial of the right of the vendee to make lawful use of the property after its sale indirectly affects and deprives the vendor of his right. *Moreover, as long as the article retains its character of lawful property the right of the vendee can be no less than that of his vendor.*
>
> "We are of the opinion that the refusal of the permit applied for by the purchaser of the animal was without justification, and that the owner could not be deprived of his right to remove his property in a proper manner. The conviction of the plaintiff in error, who acted as the employe of the owner in the matter of the removal was, therefore, erroneous and the decision is reversed."

And again in the later case of Mann vs. District of Columbia (22 App. D. C. 146) involving precisely the same questions the court said :

> "There is no substantial difference between this case and that of Campbell vs. District of Columbia, 19 App. D. C. 131, which was decided on December 4th, 1901, and wherein it was held that the death of a domestic animal does not terminate the owner's property in it, and, while he may be required to dispose of the carcass so that it will not become a nuisance, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another; that he may remove it by the agency of others as well as by himself; that this includes the right to dispose of it by sale and the removal of the dead animal by the vendee. We see no reason under the existing conditions to depart from that ruling."

Under the principle announced in the foregoing cases, it is respectfully submitted that the right of property which the owner of the meat had in the fat did not terminate when the fat was removed or trimmed from the meat, and that under the decisions in the two cases cited the owner has an absolute right to make whatever use of the fat which he saw fit, provided that he did not do so in such a manner as to cause it to become a nuisance ; that he had the right to reduce the fat to grease and to dispose of the same by sale, and that he was entitled to have it removed by his vendee within a reasonable time, before it could become a nuisance or a menace to the public health.

In the case of Dupont vs. District of Columbia, (20 App. D. C. 477) in which the court passed upon the validity of the regulations in respect to the removal of garbage, and held them to be a valid exercise of the police power, the court used the following language, which it is respectfully submitted is especially applicable to the case at bar and

sustains the contention of the plaintiff in error.

> "In reaching the conclusion that the regulation under the facts of this case is a valid exercise of the police power, we are not to be understood as holding that all matter which may be laid aside merely in the preparation of dishes for the table is necessarily garbage, and, therefore, subject to the same regulations in all respects. We agree with the Supreme Court of Connecticut in the case of State vs. Orr, 68 Conn. 101, *that there may be some things, as for example meat trimmings, fruit and vegetable parings and the like that are capable of unobjectionable uses. This the owner could not be compelled to throw away, but might make any reasonable use of before they could become offensive.* But when such matter is mingled with garbage it becomes likewise subject to public control notwithstanding that in some instances the owners might be able to dispose of it in its unreduced state as either animal food or manure."

Upon an examination of the foregoing decisions of this court, it will readily be seen that it is the settled law of this jurisdiction that the owner of property, either in a dead animal or of material laid aside in the preparation of food stuffs, has an absolute right to make disposition of it, provided he does so in such a manner that it is not allowed to become a nuisance or a menace to the public health. The plaintiff in error respectfully submits that these decisions absolutely settle the law in this jurisdiction, and that under them, and under the facts of this case as shown by the record, he was entitled to an acquittal.

In the case of State vs. Orr, 68 Conn. 101, which is cited with approval in the Dupont case, the court said :

> "Construing this ordinance with the strictness properly applicable to municipal legislation of a penal nature, the term 'refuse matter' can only extend to

matter which is in fact noisome, or which has been refused and rejected by the owners as worthiess. *Meat trimmings, potato parings, specked apples and many other things of a like character might be thrust aside in preparing table dishes and yet properly utilized for other purposes.*

"The ordinance does not extend to comprehend that which is separated and thrown aside in the preparation of food for the table. *Whatever of this description is not abandoned as worthless remains property, which so long as it does not constitute a nuisance may be sold or otherwise disposed of at the will of the owner.*"

In the case of the City of St. Louis vs. Robinson (135 Mo. 460) in which the defendant was convicted of hauling garbage under a regulation similar to the one here in question, and upon evidence which showed that, when the defendant was arrested, he was hauling a lot of cleaned heads, ribs and feet of beef cattle through the public streets of the city of St. Louis in a wagon closely covered with a tarpaulin, the appellate court in reversing the judgment of the lower court said :

"The contents of the wagon belonged to P. B. Mathiason & Company, who were thene ngaged in manufacturing glue, bone-black and fertilizer in the city of St. Louis out of materials of that kind, and he had purchased the load that defendant was prosecuted for hauling from the pork packing and sausage factory for manufacturing purposes. The defendant insists that there was an entire failure of proof, and that the judgment of the court below should be reversed on that ground. There is much force in this contention unless the words "Garbage and offal" as used in the ordinance comprehend within the meaning of one or both of them trimmed and skinned heads, ribs and feet of cattle such as the evidence showed defendant was hauling at the time of the alleged complaint.

> "*It seems clear to us that the articles which defendant was hauling did not come within the definition of garbage or offal. These are articles of commerce, so that it cannot be said that any of them were offal or refuse organic matter.*"

It is respectfully urged by counsel for the plaintiff in error the law is settled by these authorities, that where the owner has property in his possession such as is described by the evidence in this case, he had an undoubted right to dispose of it such manner as he deemed best in his interest, so long as he did not utilize it in such a way as to become a nuisance, and that, in the light of these principles of law as shown by the authorities quoted from, the judgment of the court below was erroneous and should be reversed.

The sixth assignment of error is directed to the refusal of the court to grant the fifth prayer of the plaintiff in error, which reads as follows:

> "5. The defendant prays the court to rule as a matter of law that upon the whole evidence of this case, the material which is shown to have been hauled by the defendant on the day charged in the information is not garbage within the ordinary meaning of that term, or within the scope of the regulations promulgated by the Commissioners, but that the same is an article of commerce which the owner thereof might dispose of without undue restriction, provided it is not shown to be a nuisance and a menace to the public health, and the defendant is entitled to be acquitted."

The authority vested in the Commissioners of the District of Columbia to pass regulations under the police power for the preservation of the health of the community at large confers upon them the right to make reasonable regulations to accomplish this end, but, it is submitted, under guise of this authority they can not arbitrarily take away the prop-

erty of an individual, unless it is shown to be of such a character as to amount to a nuisance or a menace to the public health.

In the foregoing prayer the court was asked to rule as a matter of law that the grease which was being hauled by the defendant at the time charged in the information was not garbage, unless the evidencd showed that it was a nuisance or a menace to the public health.

This court in the Dupont case said: "Garbage, as used in the act of Congress, must be given its ordinary meaning," and quotes the definition given in Webster's Dictionary, which is, "Refuse, animal or vegetable matter from the kitchen—worthless, offensive matter," and continuing, says: "Both from the word itself, and the official definition, the ordinary mind would understand the regulation as applying to matter which is in fact noisome." * * *

The evidence in this case showed that the material in question had not bəen abandoned as worthless by the owners and proprietors of the New Willard Hotel, but that it had been prepared for sale, and in the light of the foregoing decisions it is urged that this prayer should have been granted, because under the principles as laid down by this court the right of property still attached to the fat after it had been trimmed from the meat, and the owners right to dispose of it should be unhampered unless it had been allowed to remain on the premises a sufficient length of time to become a nuisance. The evidence furthermore showed that the defendant made collection of the grease from the hotel the day preceding his arrest, and on the day of his arrest had collected only the accumulation for the preceding twenty-four hours. There was no evidence to show that the grease was of such a character as to be a nuisance, but on the contrary the evidence showed that the grease was in

the kitchen of one of the leading hotels of the city, where it is not reasonable to suppose that it would have been allowed to remain had it been offensive in character. Before the fat had been removed from the meat, the owner undoubtedly had an absolute right to dispose of the meat and the fat without any objection by the municipal authorities; can it be said with any semblance of reason that, after the fat had been removed from the meat, "the property-right in it ceased to exist.

It is earnestly urged that proposition of law presented by the prayer was a correct statement of the law as it had been laid down by this court in the cases cited, that the court committed manifest error in refusing to grant it, and that the judgment of the court below should be reversed on this ground.

In the case of Bauer vs. Casey, 26 Ohio C. C. 598, in which the defendant was charged with a violation of a regulation similar to the one here in question, the appellate court in reversing the judgment of the court below said:

> "Condemned food which has not been abandoned by the owner, and has a commercial value, is not liable to create a nuisance, as its very value is an inducement to the owner to apply it to such uses as he will develop its real value, from which he may realize."

It is respectfully submitted that, in this case, the evidence showed that the employer of the defendant was engaged in a legitimate business, and had been so engaged for a number of years; that the property was purchased by it from the proprietors of the New Willard Hotel; that it was not garbage but was an article of commerce which the owner had the right to dispose of at his pleasure, provided it was not shown to be a nuisance or a menace to the public health; that the evidence in this case did not show it to be,

or to be likely to become, in the slightest degree a menace to health; that the owner was by law entitled to a reasonable time in which to make sale of it and have it removed from his premises, and that, upon authority of the decisions cited, the judgment of the police court was clearly erroneous and should be reversed.

GEO. P. HOOVER,
Attorney for Plaintiff in error.

Court of Appeals of the District of Columbia

OCTOBER TERM, 1906

No. 1726

No. 18 Special Calendar

STEPHEN H. NASH, PLAINTIFF IN ERROR

vs.

DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF CASE

The defendant was convicted in the Police Court on an information charging him with conveying certain garbage in a vehicle through the streets of the City of Washington, he not being the city contractor, contrary to the garbage regulations, etc.

The testimony in support of the charge was to the effect that the defendant was conveying in a cart on Pennsylvania avenue, northwest, certain cans containing grease and rotten meat from the Willard Hotel; that the contents of the cans were offensive; that the contents looked as

though they had been rendered to some extent, but not altogether; that it was not all boiled up, because there were some pieces of meat in it.

The testimony for the defense was in effect that the matter contained in the cans was liquid grease, produced by boiling the fat and meat refuse from the table of the hotel. That the grease so produced is first used by the hotel for frying purposes, and, after it becomes dark and unfit for that use, is put in cans used for the purpose and sold to the Norton Manufacturing Company, manufacturers of greases and fertilizers, for two cents per pound; that cans were collected by the defendant about four times a week; that it is not offensive and is not mingled with the ordinary garbage of the hotel.

The defendant contends:

First—That the contents of the can was not garbage within the meaning and intent of the regulation governing the disposition of garbage.

Second—That if within the meaning and intent of the said regulation, the regulation is unreasonable and void.

ARGUMENT

The sections of the garbage regulations involved in this proceeding are:

Sec. 1. "The word 'garbage,' wherever it occurs in these regulations, shall be held to mean the refuse of animal and vegetable foodstuffs." * * *

Sec. 8. * * * "No other persons or party, except the District contractor, his, their or its agents, shall carry, convey or transport through the streets, alleys or public places of the said District, any garbage, noisome dead animal, decayed fish, or refuse animal or vegetable matter." * * *

The settled law on the subject of garbage regulation in this jurisdiction leaves but one question open for discussion in this case, that is, whether or not the material which the defendant was conveying could properly and reasonably be

classified as garbage. This question practically embraces all of the contentions of the complainant. The case at bar cannot be distinguished in principle from that of Dupont v. District of Columbia, 20 App. D. C., 487. The regulation defines garbage as the refuse of animal and vegetable foodstuffs, and it can not be questioned that the substance which the defendant admits he was conveying in his vehicle falls literally within the scope of that definition. The Court of Appeals, in the case referred to, recognizes the definition incorporated in the regulation, and supplements it by the further definition that the term "garbage" would apply to matter which is in fact noisome and to that also which has been rejected as worthless and mingled with it. The question in this case, then, is whether or not the matter contained in the defendant's cans was in fact noisome.

That question was decided by the court below in the affirmative, and, it is submitted, that finding is conclusive of the question. The defendant, on the other hand, contends that the contents of the cans consisted of liquid grease, the residuum of the meat and fat refuse of the foodstuffs of the Willard Hotel, which had undergone a certain reducing process which removed it from the classification of garbage and converted it into a valuable article of commerce, to the control and disposition of which he was entitled without unreasonable restrictions.

The evidence for the prosecution proved to the satisfaction of the court below that the material was noisome. That evidence consisted of the testimony of two police officers, who could have no conceivable purpose in misstating the facts, to the effect that the matter consisted of partially rendered fats, mingled with pieces of rotten meat, and that it was offensive in smell. The evidence for the defense consisted of the testimony of the chef of the hotel, of the defendant himself, and of the superintendent of the corporation which purchased the material. Their testimony was, first, that it was not offensive; and, second, that it was grease, not garbage. On the first proposition the value of

this testimony is greatly weakened by the fact that all of these witnesses were continually in an environment which would destroy their susceptibility to the influence of smells of the character which would naturally emanate from such material. They are all in a measure interested witnesses, and this court, even if it does not consider itself bound by the finding of the court below on this proposition—could scarcely reach a different conclusion. On the question of the character of the matter, the Willard Hotel chef, a witness for the defense, states that the refuse fats and meats of the table were boiled for the purpose of extracting the grease they would produce for frying purposes; that this grease was used for that purpose until it became unsuitable, when the residuum was turned over to the defendant. This statement would seem to definitely establish its character as the refuse of animal foodstuff. It was no longer fit for food, or for any of the uses of the table or kitchen, and the reducing or rendering process to which it was subjected was simply incidental to ordinary kitchen usage.

The money value of the product is not the controlling test. As was said by this Court, in the Dupont case—

> "The mere fact that the defendant was willing to buy garbage and use it for those purposes is not sufficient to remove it from the category of nuisances, and settle its character as property. While money value is evidence, and sometimes very strong evidence to that end, it is not of itself sufficient to make a case of unreasonableness and oppression against the law and the regulations under consideration."

In the case of Walker et al. v. Jamieson, 140 Ind., 598, which was a suit to enjoin the defendant, he not being the city contractor, from removing garbage, and in which the ordinance imposed the cost of removing the garbage upon the householder, who produced it, the Court said—

"We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which can not be one, but it is equally settled that it has the power to treat as a nuisance a thing that, from its character, location and surroundings, may become such. In doubtful cases where a thing may or not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions under a general delegation of power like the one we are considering, their action under such circumstances would be conclusive of the question." * * *

"It may be that the hotel and restaurant keepers will lose money under the workings of this contract, where before they derived a revenue, but, if under the plan the sources of contagion or disease will be more speedily and effectively removed, the city was empowered to make the contract."

In the case of the City of Grand Rapids v. De Vries, 123 Mich., 570, which was a prosecution for collecting and transporting garbage without a license, in which Section 3, of the ordinance defines "garbage" as including "every refuse accumulation of animal, fruit or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, foul, food or vegetables," it was contended for the defense that the charter power is confined to nuisances and to substances which are actually unwholesome or nauseous, while the ordinance extends to all garbage under the very broad definition of that term laid down in the aforesaid section irrespective of whether the same is a nuisance or whether it is, in fact, wholesome or unwholesome. Said the Court—

"The charter provisions empower the council to pass ordinances to regulate the removal and disposal of garbage, &c. In Section 3, of the ordinance, the garbage

and offal are defined to include 'every refuse accumulation of animal, fruit or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, foul, food or vegetables.' These matters in and of themselves are regarded as nuisances; that is, the ordinary and accepted meaning of the words 'garbage and offal' is such refuse that in and of themselves are nuisances."

To like effect are the cases of Vandine, petitioner, 6 Pick., 187, and State v. Payssan, 47 La. Ann., 1029.

II

The case of State against Orr, 68 Conn., 101-113, cited by the other side, is an authority not at all at variance with the principles contended for by the prosecution, and is an instructive decision on the question at issue. This was a prosecution for collecting and transporting garbage without a license. Said the Court—

"The ordinance brought in question upon this proceeding deals only with such refuse matter as accumulates in the preparation of food for the table. Refuse matter, as the term is thus employed, can embrace nothing which has not been refused or rejected because it has little or no value for human food, or because it is decayed or unwholesome.

"It must in its nature be perishable, and can include little which is not liable to become decomposed or offensive, if left where its falls.

"Much, however, that is of the nature of garbage and offal, and has slight value for table use, may not be unsuitable for the food of animals, for manure, or as materials for manufacture. Construing this ordinance with the strictness properly applicable to municipal legislation of a penal nature, the term 'refuse matter' can

only extend to matter which is in fact noisome, or which has been refused or rejected by the owner as worthless * * *

"The defendant offered evidence to prove, and claimed that it did prove, that the garbage he collected was fresh, and some of it fit for food; and there was no evidence on either side tending to show that any of this garbage 'was sour or putrid, and for that reason dangerous to public health.' In view of this, the defendant asked the Court to instruct the jury that the privilege of contracting to transport garbage is a liberty and property right, of which one can not be deprived without due process of law; unless the jury find that such garbage at the time of its transportation is a nuisance and detrimental to health.

"Such instructions were properly refused. It was a violation of the ordinance to collect and transport the kitchen refuse which was its subject, whether such of it as was being transported at the time of the act complained of was noxious or innoxious. It was enough that it was 'such refuse matter as accumulates in the preparation of food for the table.' There is so much of this kind of matter that is offensive and dangerous to the health of the community that all may be properly made the subject of public supervision and control * * *

"The ordinance does not extend to everything that is separated and thrown aside in the preparation of food for the table. Whatever of this description is not abandoned as worthless remains property which, so long as it does not constitute a nuisance, may be sold or otherwise disposed of at the will of the owner. If the evidence had shown both that the contents of the defendant's carts while they had been rejected for table use, *were not offensive,* and that they were in his possession as the agent or the vendee of the original owner, he might have been entitled to a verdict."

It is submitted that the question in the case at bar is reduced to whether or not the material which the defendant was conveying was susceptible of putrefaction or decomposition; if it had been refined to such an extent as to prevent further decomposition, then it is conceded that the appellant's contention would have been well founded, but he relies upon the fact that this matter had undergone, according to the testimony in the case, a process which at best only diminished its noxious properties. The testimony brought out by the appellant's questions with respect to the effect of heat, &c., on the contents of the cart show an assumption on his part that this matter was susceptible of further decomposition. The testimony of the officers is convincing that it was, in fact, putrid. It is submitted that the judgment of the Court below, on the evidence, could not have been otherwise and should be affirmed.

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